No. 17-1702

IN THE
Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORP., DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE,
Petitioners,

v.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF NCTA – THE INTERNET & TELEVISION ASSOCIATION IN SUPPORT OF NEITHER PARTY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, *Amicus Curiae* NCTA – The Internet & Television Association ("NCTA") states that it has no parent corporation and no publicly held company holds ten percent or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving nearly 80 percent of the nation's cable television customers, as well as more than 200 cable program networks. The cable industry is also a leading provider of residential broadband service to U.S. households.

The immediate question presented by this case is whether individuals who produce public access cable programming possess a First Amendment right to have that programming transmitted over public access cable channels. But behind this question is the more fundamental issue of whether the requirement imposed on NCTA's members to set aside public access channels in the first place violates *their* First Amendment rights by compelling them to retransmit content over which they lack all control and that they may not want to distribute. While the parties have not raised that issue here, the First Amendment interests of NCTA's members will be directly affected by the outcome in this case regardless of how this Court decides the

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

questions presented. NCTA does not take a position on how the Court should decide those questions, but urges the Court to recognize in its opinion that the First Amendment rights of cable operators are burdened by the requirement that operators set aside public access channels, and to clarify that the Court is not deciding that this requirement is constitutional.

SUMMARY OF ARGUMENT

The case before this Court is framed as a dispute over the supposedly competing First Amendment rights of Petitioners, who manage public access cable channels on behalf of New York City, and Respondents, who produce original content that they wish to air on those channels. But this dispute cannot properly be analyzed without acknowledging the important, antecedent First Amendment rights of another entity: the cable operator that owns the network over which both Petitioners and Respondents claim they are entitled to exercise control.

Decades ago, Congress passed a statute that authorizes cable franchising authorities to require cable operators to cede capacity on their privately owned cable systems to franchising authorities for "public, educational, and governmental" ("PEG") channels, pursuant to terms and conditions established by the government. That statute also prohibits cable operators from exercising any editorial control over such channels. This Court has held that a cable operator's editorial discretion over the programming offered on its cable system is an exercise of speech protected by the First Amendment. Forcing cable

operators to relinquish control over PEG channels is a direct intrusion on those First Amendment rights.

This Court has never been directly presented with the question (and thus has never decided) whether the PEG-channel requirement violates the First Amendment rights of the cable operators that own that channel capacity, but there is good reason to find that it does. The PEG-channel requirement mandates that cable operators must retransmit speech with which they may vehemently disagree—indeed, even offensive speech. Moreover, the PEG-channel requirement is facially content-based. It is aimed at *particular* classes of speakers and requires cable operators to retransmit *particular* categories of speech based solely on its content. Finally, even assuming that there was a need to impose this burden decades ago when cable arguably exercised "bottleneck" control over programming delivered to viewers, there is no reason to continue to impose this burden today, when there are abundant alternative media to distribute the programming content that is transmitted over public access channels.

While the question of whether the PEG-channel requirement is itself constitutional is not directly before this Court, it is the backdrop against which this Court is deciding the actual questions presented here. Regardless of how the Court comes out on these questions, the First Amendment rights of cable operators will continue to be burdened. The Court should recognize that fact in its opinion and should make clear that in resolving this case, the Court is not implying or deciding that the PEG-channel requirement is itself constitutional.

ARGUMENT

I. Cable Operators Have First Amendment Rights That Are Burdened by the PEG-Channel Requirement.

Cable operators engage in protected speech under the First Amendment when they select the programming that they wish to transmit to their subscribers over the channels that they operate. This Court has never been squarely presented with the question of whether the PEG-channel requirement violates those protections, but there can be no question that it burdens cable operators' First Amendment interests. The PEG statute requires cable operators to transmit and associate with speech that they have not chosen to transmit and with which they may disagree, and that obligation is explicitly based on the content of the speech: cable operators must specifically associate with public, educational, or governmental programming.

As such, the PEG-channel requirement's burden on cable operators' First Amendment rights could only be justified by a compelling governmental interest to which the requirement was narrowly tailored. Even assuming that Congress enacted the PEG-channel requirement decades ago to further a then-legitimate governmental interest in ensuring cable subscribers' access to a wide variety of programming choices, the dramatic changes in the marketplace make it far more difficult today to justify the burden imposed by that requirement.

A. Cable Operators Have First Amendment Rights in the Selection and Transmission of Cable Programming.

This Court has repeatedly made clear that cable operators possess First Amendment rights with respect to the selection and transmission of programming over their networks. Cable operators engage in speech in at least two ways. First, they themselves produce original content that is transmitted over the cable systems that they own. Second, with respect to content produced by others, "cable operators exercise 'a significant amount of editorial discretion regarding what their programming will include.'" *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986) (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979)). "Thus, through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [a cable operator] seeks to communicate messages on a wide variety of topics and in a wide variety of formats." *Id.* In these ways, cable television "partakes of" the "aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers." *Id.*

Cable operators thus are entitled to the full First Amendment protections afforded to traditional members of the print media who both produce their own content and exercise editorial discretion. As this Court stated in *Leathers v. Medlock*, 499 U.S. 439 (1991): "Cable television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of

its operation, part of the 'press.'" *Id.* at 444. Indeed, it is now so well-settled, that "[t]here can be no disagreement" that "cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636-37 (1994); *see also Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 815 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part) (noting that the Court agreed in *Turner* that "cable operators are generally entitled to much the same First Amendment protection as the print media"); *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1322 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (noting that cable operators "are similar to publishing houses, bookstores, playhouses, movie theaters, or newsstands in the sense that they exercise editorial control in picking the content they will provide to consumers").

B. When This Court Last Considered the PEG-Channel Requirement, It Did Not Decide the Provision's Constitutionality.

Against this backdrop of cable operators' First Amendment rights, this case comes to this Court framed as a dispute over the supposed First Amendment right of a producer of cable programming to transmit programming over the channels that have been commandeered by federal statute for the public's use. These channels are known as "public, educational, or governmental" channels, or "PEG" channels. 47 U.S.C. § 531(a), (b). Federal law requires a cable operator to obtain a franchise from a state or local

government (in this case, New York City) to construct and operate a cable system to provide cable television services, *see id.* § 541(b)(1), and authorizes this governmental "franchising authority" to require the cable operator to set aside PEG channels as a condition of granting or renewing the franchise, *see id.* § 531(a), (b). PEG channels can be managed by cable operators, but generally are managed by the local franchise authorities themselves or by nonprofit entities like Petitioner Manhattan Community Access Corporation. Regardless, and even if they manage the PEG channels themselves, cable operators are *prohibited* by statute from exercising "*any* editorial control over any public, educational, or governmental use of channel capacity." *Id.* § 531(e) (emphasis added).

This Court has never directly addressed whether this statutory requirement for PEG access is an unconstitutional infringement on cable operators' First Amendment rights. In *Denver Area*, a plurality of this Court agreed that Congress could not authorize cable operators to restrict obscene or unlawful content transmitted over PEG channels. *See* 518 U.S. 727. But as Justice Stevens noted, the PEG programmers' First Amendment claim in that case "depend[ed] for its success on the constitutionality of the underlying access rights" over the cable operator's network. *Id.* at 770 n.2 (Stevens, J., concurring). And, as the separate opinions in that case made clear, the Court did *not* address that antecedent question of whether "the Government has the authority to impose" the PEG "requirement[] on cable operators." *Id.*; *see id.* at 820-21 (Thomas, J., concurring in the judgment in part and

dissenting in part) ("[T]he constitutionality of . . . public access channels is not directly at issue in these cases."). Instead, in reaching the plurality decision in *Denver Area*, the Court simply "assume[d]" that the PEG requirement was constitutional. *Id.* at 770 n.2 (Stevens, J., concurring). Thus, in its only decision regarding the PEG-channel requirement, the Court bypassed the predicate question of whether that requirement violates the First Amendment rights of cable operators.

Justice Thomas, however, joined by Chief Justice Rehnquist and Justice Scalia, wrote separately to acknowledge the importance of that predicate question and to recognize the burden the PEG-channel requirement places on cable operators. As Justice Thomas explained, obligations that cable operators carry particular programming "interfere[] with the operators' editorial discretion by forcing them to carry broadcast programming that they might not otherwise carry." *Id.* at 816 (Thomas, J., concurring in the judgment in part and dissenting in part).[2] Indeed, "[t]here is no getting around the fact that . . . public access [is] a type of forced speech." *Id.* at 820.

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[2] The PEG-channel requirement also "burden[s] cable programmers by reducing the number of channels for which they can compete." *Turner*, 512 U.S. at 645.

C. The PEG-Channel Requirement Significantly Burdens the First Amendment Rights of Cable Operators.

The PEG-channel requirement is constitutionally suspect not only because it is forced speech, as Justice Thomas recognized in *Denver Area*, but also because it is facially both content-based and speaker-based and because it cannot be justified in light of today's market conditions.

The freedom to refrain from speaking is, of course, as protected as the freedom to speak. *Denver Area*, 518 U.S. at 821 (Thomas, J., concurring in the judgment in part and dissenting in part); *see also Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2464 (2018) ("When speech is compelled ... individuals are coerced into betraying their convictions. . . . Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns."); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) ("Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say.").

When cable operators are forced to carry speech over which they cannot exercise any editorial control, there is a significant risk that cable subscribers—the customers on whom cable operators rely—will

incorrectly attribute the speech to the cable operators, assuming that the cable operators have *chosen* to transmit the programming that appears on those channels. This results in a significant harm to cable operators.[3] *See id.* at 15 (concluding that regulatory requirement that utility allow third parties to communicate messages in utility's billing envelopes "impermissibly requires [the utility] to associate with speech with which [it] may disagree," because the utility "may be forced either to appear to agree with [the third party's] views or to respond").[4]

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[3] For example, a cable operator was forced to carry programming from an organization classified as an active hate group by the Southern Poverty Law Center that encouraged violence, including gruesome beatings and beheadings. Another was forced to air a program in which a candidate for a local political office gossiped about opposing candidates' personal lives. Other examples abound. Cable operators often must respond to customer complaints regarding programming that is transmitted on PEG channels.

[4] In *Turner*, this Court rejected the argument "that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." *Turner*, 512 U.S. at 655. But that conclusion was based on the specific features of broadcast stations that render them recognizable to consumers as distinct from cable operators. *See id.* From a subscriber's perspective, there is a less clear demarcation between the programming that runs on PEG channels and the programming that runs on channels managed by the cable operator.

Moreover, the PEG requirement is particularly problematic because, as commentators have noted, it is "content-based on [its] face." Erik Forde Ugland, *Cable Television, New Technologies and the First Amendment After* Turner Broadcasting System, Inc. v. F.C.C., 60 Mo. L. Rev. 799, 837 (1995). Facially, the statute singles out "particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015). The PEG-channel requirement compels cable operators to transmit certain types of content—programming dealing with public, governmental or educational issues. The statute thus speaks to the content of the speech transmitted, not merely the mechanism of transmission.

While forcing cable operators to speak is constitutionally suspect, doing so based on the content of the forced speech and the identity of the speaker is all the more so. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 2228. As a result, "[c]ontent-based laws ... are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226. Similarly, laws such as the PEG-channel requirement "favoring some speakers over others demand strict scrutiny" specifically because "the legislature's speaker preference reflects a content preference." *Turner*, 512 U.S. at 658; *see also Reed*, 135 S. Ct. at 2230-31.

Even assuming there was a compelling governmental interest in providing a platform for public, educational, and governmental programming on cable systems when the PEG statute was originally enacted, there does not appear to be any such compelling interest today. This Court found in *Turner* that, in the 1980s and early 1990s when the PEG-channel requirement was imposed, "the physical connection between the television set and the cable network [gave] the cable operator bottleneck . . . control over most (if not all) of the television programming that is channeled into the subscriber's home." *Id.* at 656. As a result, "a cable operator [could] prevent its subscribers from obtaining access to programming it chooses to exclude." *Id.*

In light of cable's "bottleneck" control, "[t]he PEG . . . provisions were enacted to . . . afford[] speakers with lesser market appeal access to the nation's most pervasive video distribution technology," and to "[e]nabl[e] a broad range of speakers to reach a television audience that otherwise would never hear them." *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 6 (D.D.C. 1993), *aff'd in part sub nom. Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), and *aff'd in part, rev'd in part sub nom. Time Warner Entm't Co., L.P. v. FCC*, 211 F.3d 1313 (D.C. Cir. 2000).

That rationale—which the Court used in the 1990s to justify a similar intrusion on cable operators' First Amendment rights in the *Turner* cases upholding the "must-carry" provisions—no longer applies. As then-Judge Kavanaugh recognized several years ago in his

concurring opinion in *Agape Church, Inc. v. FCC*, 738 F.3d 397 (D.C. Cir. 2013): "In the two decades since Congress enacted the Cable Act of 1992, the video programming marketplace has radically transformed. Cable operators today face intense competition from a burgeoning number of satellite, fiber optic, and Internet television providers—none of whom are saddled with the same program carriage and non-discrimination burdens that cable operators bear . . . . Cable operators 'no longer have the bottleneck power over programming that concerned the Congress in 1992.'" *Id.* at 413-14 (Kavanaugh, J., concurring) (quoting *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009)). Indeed, of the seven multichannel video programming distributors ("MVPDs") that had over one million subscribers at the end of the third quarter of 2018, only four were cable companies—one was a telephone provider (Verizon Fios), another a satellite provider (DISH Network), and the third a combined telephone and satellite provider (AT&T).[5]

In today's dynamic marketplace, consumers can readily access video content not only from MVPDs but "through a variety of Internet applications, such as YouTube and Hulu," *Cablevision Sys. Corp.*, 597 F.3d at 1316 (Kavanaugh, J., dissenting), a list that only

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[5] Press Release, Leichtman Research Group, Inc., *Major Pay-TV Providers Lost About 975,000 Subscribers in 3Q 2018* (Nov. 13, 2018), https://www.leichtmanresearch.com/major-pay-tv-providers-lost-about-975000-subscribers-in-3q-2018/.

continues to expand, and includes Netflix, Amazon Prime Video, and other popular web-based video programming options.[6] Online video providers known as "virtual" MVPDs now compete with cable operators to provide full-fledged channel line-ups, including broadcast and cable channels as well as on-demand programming.[7] While, in the past, these online services were accessible only on computers, today's digital television sets include multiple connectors for peripheral devices that provide ready access to these services.[8] So-called "smart" TVs also come preloaded

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[6] *See also, e.g., In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd 568, 591 ¶ 55 (2017); YouTube by the numbers, https://www.youtube.com/yt/about/press/ (visited Dec. 7, 2018) ("Over 1.9 Billion logged-in users visit YouTube each month and every day people watch over a billion hours of video and generate billions of views.").

[7] *See, e.g.*, Jeff Baumgartner, *Virtual MVPDs Ended 2017 with 5.3 Subs: Study*, Multichannel News (Feb. 12, 2018), https://www.multichannel.com/news/virtual-mvpds-ended-2017-53m-subs-study-418107; Swaminathan Sankaranaryanan & Balasubramanian Muthuswamy, Infosys, *Virtual Multichannel Video Programming Distributor: The Game, Players and the Playing Field* (2017), https://www.infosys.com/industries/communication-services/white-papers/Documents/virtual-multichannel-video-programming.pdf.

[8] Jeff Baumgartner, *Study: 74% of U.S. TV Homes Have at Least One Connected TV Device*, Multichannel News (June 8, 2018), https://www.multichannel.com/blog/study-74-u-s-tv-homes-have-at-least-one-connected-tv-device.

with apps—and permit direct downloading of new apps—that easily connect to many of these services, rendering even a peripheral device unnecessary.[9] And all televisions today provide the capability to switch easily between and among online and MVPD services with a simple click on a remote control.[10]

Moreover, television is no longer the only means to obtain video programming. Wireless communications providers increasingly allow their customers to access video content online and on the go—completely bypassing both their local internet and cable providers. Smartphones and tablets empower the consumption of video whenever and wherever consumers want it.

This dynamic marketplace could not have been envisioned when the PEG-channel requirement was enacted and many of the aforementioned services did not even exist. Today, this intense competition among distributors of video programming for consumers means that a cable operator can no longer "prevent its

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[9] Jason Lynch, *Nearly 70 Million U.S. Households Now Have a Connected-TV Streaming Device*, AdWeek (Nov. 16, 2017), https://www.adweek.com/tv-video/nearly-70-million-u-s-households-now-have-a-connected-tv-streaming-device/.

[10] Thus, this Court's determination in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), that "it is rare for [cable subscribers] ever to switch" from cable to over-the-air broadcast television, *id.* at 220 (quoting S. Rep. No. 102–92, at 62 (1991)), even if accurate in 1997, no longer accurately describes cable subscribers' realistic alternative television programming options.

subscribers from obtaining access to programming [that the cable operator] chooses to exclude." *Turner*, 512 U.S. at 656. It also means that cable operators, alone among all of these providers of video programming services, are uniquely subject to onerous carriage obligations that place them at a competitive disadvantage based on outdated evaluations of the market in which they operate.

This increase in alternative distribution platforms is available not only to providers of commercial programming, but also to the producers of original programming of the type that previously might have had an outlet only on PEG channels. Today, Americans who want to distribute their own programming have instantaneous access to millions of "channels" and the ability to communicate with the world by uploading their own video content. Websites like YouTube allow users to upload, for free, original video content. That content can and often does reach far more viewers than a PEG channel. Individuals, educational institutions like public schools and universities, and governmental institutions can—and often do—use these web-based platforms for distributing video content to interested members of the public.[11] Many local governments now provide online access to both live streams and

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[11] Indeed, Respondents' programming is available on YouTube, acutely demonstrating cable operators' lack of bottleneck control over that speech. *See* DeeDee Halleck, *The 1% Visits El Barrio*, YouTube (July 29, 2012), https://www.youtube.com/watch?v =QEbMTGEQ1xc.

downloadable archived videos of local government meetings that previously were made available only on public access television. *See, e.g.*, New York City, New York, *City Council Videos*, https://councilnyc.viebit.com/ (last visited Dec. 10, 2018). As that example illustrates, local governments, educational institutions, and individuals can (and do) now easily provide content to interested citizens in ways that are far more user-friendly than a PEG channel. In short, any concern over cable's programming "bottleneck" in 1992 has been rendered obsolete by the introduction of satellite broadcasting and the advent of the internet.

This changed media landscape renders untenable the claim that the PEG-channel requirement is necessary to serve a governmental interest in providing access to speakers who would otherwise be unable to reach cable consumers. In today's media market, those speakers could reach that audience in numerous ways other than through a public access channel.[12]

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[12] In *Turner*, this Court held that intermediate, rather than strict, scrutiny applied in reviewing the "must-carry" statute that requires cable operators to set aside channels for broadcast stations like the local affiliates of NBC or CBS. *Turner*, 512 U.S. at 636-63. Importantly, however, that holding depended on the very technological features of cable television and the video programming market that, as explained in the main text, are no longer applicable today. *Turner*, 512 U.S. at 656. Today, for the reasons explained above, the appropriate standard of review for assessing the constitutionality of PEG channels would be the strict

II. Regardless of How It Resolves the Dispute in This Case, This Court Should Make Clear in Its Opinion That It Is Neither Holding Nor Implying That the PEG-Channel Requirement Is Constitutional.

As the foregoing makes clear, the dispute before this Court is somewhat artificial for the very reasons Justice Thomas recognized in *Denver Area*. *See* 518 U.S. at 820-22 (Thomas, J., concurring in the judgment in part and dissenting in part). Cable operators, not the parties before the Court, have the real First Amendment rights at stake. Here, just as in *Denver Area*, "it is the cable operator, not the access programmer, whose speech rights have been infringed." *Id.* at 824 (footnote omitted).

Respondents come to this Court essentially asserting a First Amendment right to have their programming distributed on PEG channels. But "the programmer's right to compete for channel space is derivative of, and subordinate to, the operator's

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scrutiny the Court applied in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and *Pacific Gas & Electric Co.*, 475 U.S. at 11 (plurality opinion). In any event, given the panoply of options for consumers and producers of video programming today, even under *Turner*'s intermediate scrutiny, it will be difficult for the government to explain how mandating carriage for PEG channels and speakers does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Turner*, 512 U.S. at 662 (quotation marks omitted).

editorial discretion." *Id.* at 816-17. Respondents, "[l]ike a freelance writer seeking a paper in which to publish newspaper editorials . . . [are] protected in searching for an outlet for cable programming, but ha[ve] no freestanding First Amendment right to have that programming transmitted." *Id.* at 817. Accordingly, "[i]t is not intuitively obvious that the First Amendment protects the interests [Respondents] assert." *Id.*

Petitioners, in contrast, come to this Court asserting that they are not state actors bound by the First Amendment and are simply private actors operating on a private cable system. But Petitioners miss the point. Any right they have to exercise (or not exercise) editorial discretion is statutorily created by the PEG-channel requirement and therefore comes at the expense of the editorial discretion of the cable operator. As Justice Thomas correctly observed in *Denver Area*, "the Court has not recognized, as entitled to full constitutional protection, statutorily created speech rights that directly conflict with the constitutionally protected private speech rights of another person or entity." *Id.* at 820.

In short, all parties before the Court "must concede that cable access is not a constitutionally required entitlement and that the right [Respondents] claim to . . . public access has, by definition, been governmentally created at the expense of cable operators' editorial discretion." *Id.* at 821-22. "Just because the Court has apparently accepted, for now, the proposition that the Constitution permits some degree of forced speech in the cable context does not

mean that the beneficiaries of a Government-imposed forced speech program enjoy additional First Amendment protections beyond those normally afforded to purely private speakers." *Id.* at 822. Here, just as in *Denver Area*, the question posed by the parties is whether there have been "improper restrictions on their free speech rights," but "the proper question is whether the [PEG requirement is an] improper restriction[] on the [cable] operators' free speech rights." *Id.*

Amicus takes no position on the actual questions presented by the parties. But it is important to recognize that, however this Court resolves those questions, it is likely to exacerbate the already substantial harm to cable operators' protected speech interests. If the Court rules for Petitioners, it will further cement Petitioners' control over channel capacity that rightly belongs to cable operators, but over which the operators are prohibited from exercising any editorial discretion. And if the Court rules for Respondents, it means that no one will have the right to exercise editorial discretion over the programming carried on PEG channels, increasing the risk that they will carry programming that is not only of little interest or value to a cable operator's customers, but also is offensive to those customers. Either way, cable operators are harmed further by the already burdensome PEG-channel requirement.

CONCLUSION

This Court should ensure that its decision makes clear that it is not implying or deciding that the PEG-channel requirement is constitutional and that its decision acknowledges cable operators' important First Amendment rights to exercise editorial control over the programming they transmit to subscribers.

Respectfully submitted,

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